

Imposing Conditions on Land Use:

*When Development Conditions
and Exactions are Illegal
and How to Resolve Disputes
Quickly and Fairly*

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Department of Commerce**

by

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These guidelines are provided by the Office of the Utah Property Rights Ombudsman in an effort to provide better understanding of constitutional private property protections and the land use regulation process. They are not meant to constitute legal advice. They simplify and broadly generalize complex issues of law. Questions should always be directed to your attorney for specific advice. Suggestions and comments are always welcome.

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IMPOSING CONDITIONS ON LAND USE

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN
UTAH DEPARTMENT OF COMMERCE.

A growing trend in local land use decisions is to be sure that “development pays its own way.” There are generally several options available to local government to do this, such as (1) impact fees, (2) mandated real estate dedications, (3) required improvements to public facilities and (4) other conditions on development that limit its impact. Each of these methods can be dramatically different in their origins, implementation, and effect. These tools are closely related, however, and in order to make sure that government actions placing burdens on developments are fair and reasonable, the combined burden imposed by impact fees, dedications, improvements and conditions must be considered together and balanced.

Impact Fees

Impact fees are general and apply community wide. They are set by ordinance, based on a community wide capital improvements plan, and can be relatively easily predicted and calculated.

Under Utah law, local government units may impose impact fees to offset the cost of accommodating new growth and development. These are strictly controlled by state statute, under U.C.A. 11-36-101 et. seq. Impact fees must be supported by a written adequate capital facilities plan and appropriate analysis of future growth, the need for expansion of utilities and services, and appropriate and fair sharing of the burden of related costs. Impact fees can only be assessed for capital expansion projects related to water, waste water, storm water, municipal power, roads, parks, recreation, open space, trails, police and fire stations, and environmental mitigation.

Real Estate Dedications

Often it is required that the applicant for some development approval must deed land for a road, open space, trail, or other public purpose as a condition of development. Sometimes this dedication can take the form of a surface or underground easement or the duty to allow the public to enter upon lands formerly considered to be private with restricted access. Real estate dedications can be given the most scrutiny by the courts and held to higher standards of review than other conditions and exactions on land use approvals. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994), requiring the dedication of land for flood control and a bike path; and *Nollan v. California Coastal Comm.* 483 U.S. 825 (1987), requiring the dedication of beach to state in order to obtain a building permit for a residence. A recent Utah case, *BAM Development v. Salt Lake County*, 2004 UT App. 34 (on appeal before the Utah Supreme Court at this writing), reemphasized the need for individualized determinations of fairness in a situation where the county demanded land to widen a busy street to accommodate future county road needs.

Required Improvements to Public Facilities

Most municipalities commonly require that development provide the required infrastructure and facilities to offset the burdens that development places on publicly-owned improvements like roads, water supply and waste water systems, flood water management facilities and parks. Where specific impacts are identified and the relative burdens are shown to be fair, this can be both legal and appropriate. See *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 901 (Utah 1981), stating that, whether dealing with dedications or cash requirements, “insofar as such equality can reasonably be achieved, this must be done.” See also *Call v. City of West Jordan*, 614 P.2d 1257, 1258 n.1, 1259 (Utah 1980), holding that dedication or cash payments “should have some reasonable relationship to the need created by the subdivision.” The *Call* case was cited by the U.S. Supreme Court in the *Dolan* opinion as an example of state-mandated balancing tests.

Development Conditions

Development conditions can include administrative design and configuration mandates that are placed on specific projects through the process of approving zone changes, conditional use permits, variances, subdivisions and/or building permits. They are meant to be tailor-made to offset any negative impacts created by a specific development in a specific location. While they can be initiated by a general ordinance providing for adequate public facilities or other appropriate community purposes, the imposition of conditions in order to get a project approved is typically done on an ad hoc case-by-case basis. Often there is enough flexibility written into the ordinances and codes to allow the local officials to impose specific conditions on a given project to offset the expected burdens that the project will create.

For example, if a property owner is desiring a conditional use permit, as might be required by the local ordinance, to build a truck stop, it would be predictable that the planning commission reviewing the conditional use permit may consider the negative impacts that a truck stop could have and impose design elements in order to offset them. If the facility were expected to significantly increase heavy truck parking and idling, and if the operator had to obtain a conditional use permit to build the truck stop, then the city might require that a noise and emission study be completed. If the study showed high emissions and increased noise, and if those were appropriate factors to be considered in the conditional use process, then fences and buffer zones, berms and setbacks might be required to mitigate the impact of noise and fumes. These enhancements, specifically designed to address the specific burdens that the proposed diesel truck facility might create and based on substantial evidence that the enhancements are both necessary and reasonable, would be expected, logical, and fair.

Summary - A Number of Options

To summarize then, communities have several tools in their tool box that can be used to make sure development impacts are minimized and compensated for. Each tool is somewhat different, but each must be shown to be appropriately used and fairly applied.

The Utah Courts have held that when an analysis is made of conditions and requirements imposed on land use approvals, all burdens imposed on development, including: (1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees must be subjected to constitutional analysis for fairness. *BAM* at ¶ 16, citing *Salt Lake County v. Board of Educ.*, 808 P.2d 1056, 1058 (Utah 1991). The *BAM* court also included “in-kind exactions” as being subject to constitutional analysis.

In order to preserve private property rights, the courts have held that development requirements are subject to specific scrutiny. The burdens imposed on a specific project must be justified by an individualized determination, supported by substantial evidence, that each requirement meets constitutional standards. It is important to recognize that the burden of this individualized determination lies on the local government entity. If requirements are imposed, particularly if land is to be transferred to public ownership or fundamental incidents of ownership are affected, then the local government entity must show with an individualized analysis that the exaction is “roughly” fair. See *BAM* at ¶¶ 14-16.

If the burdens and limitations on development are imposed by ordinance, Utah courts have determined that legislative review standards apply. An ordinance will be upheld if it is reasonably debatable that the ordinance will promote the public welfare. See *Bradley v. Payson City*, 2001 UT App 9, 2003 UT 16.

Adoption of a development ordinance, however, does not waive the need for an individualized analysis of how the ordinance burdens a given development proposal where dedication of land is involved. See *BAM* at ¶16 and at ¶ 58 (Orme, J, dissenting). It is notable that *Dolan*, the leading U.S. Supreme Court case on the issue, dealt with an illegal exaction of land imposed by ordinance - each property developed along a stream was required by the ordinance to include a bike path - which did not meet the constitutional standard of individualized analysis of fairness and proportionality even though it was a legislative act.

If the development requirements are imposed on a specific approval, such as site plan approval, conditional use permit, or a subdivision review, and not mandated generally by ordinance, then a local government’s burden to prove the requirements are fair is clearly higher than if a general burden is imposed on many properties by ordinance. When conditions are imposed on specific applications, there must be a showing by substantial evidence that each development requirement meets constitutional criteria. It is legal and common, however, for the municipality to impose on the applicant the duty to provide whatever studies or analysis is needed for the local decisions makers to base their analysis on.

This mandate for a local government to justify the conditions and exactions imposed on the use of land is restated and ratified in the 2005 revisions to the municipal and county land use management acts. The new language states specifically:

A municipality may impose an exaction or exactions on development proposed in a land use application if: (1) an essential link exists between a legitimate governmental interest

and each exaction; and (2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

See Utah Code Annotated, §10-9a-508. Similar language exists in the county land use management act at §17-27a-507.

The analysis of whether a development requirement is appropriate must satisfy a five-part test:

Five Requirements to Impose an Exaction:

1. Legitimate State Interest. Is the requirement based on an ordinance or statute that is related to a legitimate state interest? That is, is the goal of the requirement an appropriate goal for a governmental entity to pursue and has that goal been properly formalized in policy? There are many legitimate activities that agencies and municipalities engage in, and they generally fall under the standard measures of health, safety and general welfare. Public facilities such as streets, utilities, parks, fire protection, open space, environmental protection, etc. all qualify as appropriate public purposes. Goals that have been determined not to be legitimate state interests include the exclusion of affordable housing; pushing detrimental effects of a development onto areas outside of the agency's jurisdiction; inappropriate growth controls; racial discrimination, violations of the law, etc. The first step, therefore, is to review the purpose of the requirement and determine that its objective is appropriate. See Utah Code Annotated §10-9a-508(1) (municipalities) or §17-27a-507(1) (counties).

2. Sufficient Formality and Due Process. If the requirement is typically imposed on a broad category of approvals, it should be based on an official policy or ordinance that is adopted with appropriate public comment and review. An example would be a policy of requiring the conveyance of water rights to the city or county involved as a part of the subdivision approval process. To be legal, a development requirement cannot be placed in a manner that is arbitrary, capricious and unreasonable. Standard requirements should be uniformly applied to all projects that have a similar impact on the community. The requirements can change over time, but must be adopted with sufficient formality and apply to all future projects that have a common impact.

An alternative to a general ordinance imposing development conditions to all properties that are similarly situated may involve conditions imposed in the review of applications for discretionary land use approvals where the granting of an optional permit is normally conditioned on mitigating the impact of a proposed land use. Examples may include conditional use permits, variances, planned unit developments or some subdivision approval processes, where the ordinance allowing the use provides for the imposition of specific requirements to address the unique impact of a given project. In those situations the broad and general terms of the ordinance would set standards for approval and require findings to justify approval. In the process of review, the council or commission involved would analyze the potential negatives of the project and craft conditions and requirements of approval to specifically address those negatives and mitigate them. Where standards are set by ordinance and approvals are optional, these conditions and requirements would be suitably imposed where the record of the approval process includes substantial evidence to justify them.

It is essential to understand that there must be some context for the imposition of a requirement that is provided for in local ordinance. A government entity cannot impose requirements on a project unless it has created, through legislation adopted with due process, the right to do so. If a company shows up and wishes to begin a locally unpopular land use in a county with no zoning ordinance, then there will be very limited opportunity for making demands on the development. Most companies in such a situation, at least initially, want to be good neighbors and are willing to talk about mitigation of harm and negative impact. But the local government does not have the right to create restrictions and demands out of thin air in order to limit the use and value of private property. The process of making sure that the framework for imposing requirements on development is known as due process, and it means that hearings are held, notices are given, and the planning commission and residents have input in the process of creating laws before they take effect and before they are applied to the development review process.

In 2005 the Utah legislature adopted a broad revision to the land use statutes and clarified several areas of local discretion. For example, a provision was enacted to make it clear that the ordinances cannot be changed after an application is submitted in complete form:

- (1) (a) An applicant is entitled to approval of a land use application if the application conforms to the requirements of an applicable land use ordinance in effect when a complete application is submitted and all fees have been paid, unless:
 - (i) the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application; or
 - (ii) in the manner provided by local ordinance and before the application is submitted, the municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted.
 - (b) The municipality shall process an application without regard to proceedings initiated to amend the municipality's ordinances if:
 - (i) 180 days have passed since the proceedings were initiated; and
 - (ii) the proceedings have not resulted in an enactment that prohibits approval of the application as submitted.
 - (c) An application for a land use approval is considered submitted and complete when the application is provided in a form that complies with the requirements of applicable ordinances and all applicable fees have been paid.
 - (d) The continuing validity of an approval of a land use application is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence.
- (2) A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances.

See Utah Code Annotated §10-9a-509 (municipalities) or §17-27a-508 (counties). The 2005 revisions also provide that if a proposed subdivision complies with the subdivision ordinance, it must be approved:

Subject to Subsections (3), (4), and (5), if the plat conforms to the municipality's ordinances and this part and has been approved by the culinary water authority and the sanitary sewer authority, the municipality *shall approve the plat*.

See Utah Code Annotated §10-9a-603(2) (municipalities) and §17-27a-603(2) (counties) (emphasis added). These subsections referred to provide that before recording, the owner of the property involved must pay any outstanding taxes, obtain necessary signatures, including that of a licensed surveyor, and get clearance from underground utility operators. The plat must also be recorded within the time frame provided in local ordinance or it is voidable.

3. Essential Nexus. If we have a legitimate purpose, and the ordinance that we use to further it has been created legally, we can then consider the specific projects and the particular conditions and requirements to be imposed. The question here is whether there is an essential nexus (a rational connection) between the legitimate purpose of our government activities and the individual requirement that we plan to impose. For example, if the goal of a city is to have safe streets, and if a requirement is placed on a development in the name of that worthy goal, then there should be substantial evidence on the record to support the

This test is particularly important when real estate dedications are exacted from landowners. The U.S. Supreme Court struck down a California requirement that a private property owner allow public access along the beach because the stated goal of the regulation that was used to justify the exaction was to improve views of the beach, not access along the beach. *Nollan*. An Oregon case involved a plumbing store that was required to provide a bike path prior to expanding. *Dolan*. The Supreme Court stated that the city in *Dolan* had to make a showing of fact that the expansion of the store would have some impact on bike traffic in the community. It may not be possible to show an essential nexus between the city's goal of improving traffic and a requirement that the developer of a subdivision build a street near his project when the traffic from his project would not use or in any way affect that street. This step involves making sure that each real property dedication is reasonably connected to the purpose of the dedication and that the exaction of the real property advances that purpose.

4. Rough Proportionality. The issue here is whether the burden of the proposed requirement on the land owner is roughly proportionate to the burden that the proposed development or land use places on the public facilities involved. Again, real property dedications easements are given particular scrutiny. In *Dolan*, the Court found that a burden to provide a bike path may have been out of scale with the added bike traffic that would be generated by the expansion of a hardware store. A similar result would be predicted if the requirement to dedicate a four-lane road right-of-way were imposed on a subdivider who wished to create four single family residential lots. Four lots do not generate enough traffic to require a four-lane road. The developer of a 40-lot subdivision could be obligated to provide his share of future city parks, but not be forced to donate 40 acres of park lands -- unless the city can support one acre of park for every house in town and the court finds that to be a reasonable goal. "Rough proportionality" requires that the government entity imposing land dedications show that the burden of the dedication requirement is fair. A landowner should not be required to solve problems that she will not create, nor to solve the problem on a larger scale than the development causes.

Part of the analysis of rough proportionality for dedications, development conditions, and public improvements must be to consider the burden of impact fees as part of the total burden a property owner must bear. See *BAM*, generally. A developer required to build a large water line to connect to existing city water mains, oversized to handle more than his development, should be credited with his excess costs when any water-based impact fees are considered. State law requires such a credit when a development provides land for, improvements to or new construction of facilities that are identified in the local capital facilities plan and are required as a condition of approving the development. (U.C.A. § 11-36-202(3)(c)).

5. Least Intrusive Method. Our last issue is whether a development requirement protects the public interest in a manner that has the least impact upon private property rights. In *Dolan*, the city demanded that the property owner convey ownership of an environmentally sensitive creek area to the city in return for a development permit. The stated goal of the city was not for park purposes, but to make sure that the flood plain around the creek was not encroached upon or developed in a manner that would threaten life or property. In invalidating the dedication requirement, the court said that the land owner must not be required to hand over title to land in the flood plain if the same result could have been obtained by prohibiting development on the land while leaving it in private ownership.

It follows therefore that a developer can not be required to donate open space to the city under an ordinance that is all about open space. An ordinance that demands ownership of open space is not just about open space. It is about parks, public access and recreational amenities, the burden of which should not fall disproportionately on a property owner just because he owns land that the public wishes to use for a park.

If the city in the *Dolan* case wanted the land near the creek for a bike path, it should buy it, and not pretend that the purpose of taking title to the property was to protect the flood plain. There are less intrusive ways to protect the flood plain without taking title.

This is a real-world analysis, however. Obviously the right-of-way for a city street should be donated to the public, even if a surface easement would suffice. There is no value to the land under a surface easement, so there is no reason not to give title to the land under a road when dedicating roads as part of a development approval. On the other hand, the open space that is provided for in the front yard set back area of every home in town should not be publicly owned, nor require public access to it, because neither condition is needed to meet the goal of attractive, spacious neighborhoods. Step five is to confirm that the requirement is the least intrusive way to accomplish its goal.

If all these five factors are met, then any development requirement will probably be sustained by the courts if challenged.

Other considerations:

Timing: Development requirements must be based on currently proposed burdens. Once a property owner has a vested right to proceed because the necessary approvals are in place, the municipality cannot at a later stage come up with new requirements that impose conditions that should have been imposed earlier. For example, if a developer has obtained subdivision approval, it would be inappropriate to hold up his building permits because the city thought of something it should have required of him during the subdivision approval process.

Adequate Public Facilities: The rules limiting development requirements may not apply when the property owner is required to provide minimal facilities for safe and healthy occupancy of the property. He may be required, for example, to wait to develop a lot until there are streets of adequate width serving that lot or until there is sufficient sewer capacity or water for fire protection available. (Such requirements are often referred to as “concurrency.”)

Adequate public facilities standards must be established fairly and by ordinance, and not be the product of casual guidelines that are enforced unevenly. The standards and ordinance must be of uniform and future application from the time each is established as official policy through adequate due process. If adequate public facilities laws apply evenly to all similarly situated development and are based on legitimate public health and safety considerations they will likely be upheld. If a developer is required to provide adequate facilities that are capable of handling the demands of other future development, and which will eventually benefit other lands in the area, it would be appropriate to provide for his reimbursement of costs from those future developments as they occur. This is not necessary, however, if the adequate public facility requirements are backed up with substantial evidence that he has to provide the minimal level of service necessary to meet reasonable standards of health and safety.

Since the effect of such a restriction on development may be very severe, a local government must be sure that the health or safety issue involved is very significant when the burdens on land use is high. A court would not take lightly the loss of all economic use of property under conditions where allowing a use is not a substantial risk to health and safety. And, as mentioned, the health and safety interest must be protected in the least intrusive manner practicable.

Hook up Fees: These charges are regulated by the Impact Fees Act at 11-36-101 to -402 of the Utah Code. They may only cover the actual cost of connecting to utilities, and may not include any costs for capacity or expansion of capacity. That is the role of impact fees, discussed above. It is illegal for a municipality to attempt to impose hook up fees over and above the actual cost of the labor and materials necessary to make the utility connection as a means to collect money for some other purpose. Capital expansion, repairs, and other utility costs are to be collected through impact fees, utility rates, and other means. They are not to be financed from hook up fees that are not imposed with the same formalities required for impact fees.

Burden of Proof: The burden of establishing that the five conditions are satisfied and therefore that the development requirement is appropriate rests with the government entity. There must be a sufficient factual basis provided (substantial evidence) to establish all five factors in an individualized determination. The property owner may be required to provide sufficient data,

such as a traffic study or utility capacity analyses, as part of a development application. He can thus provide the factual basis to support development requirements, but ultimately it is the government entity that must use those facts to justify the development conditions and exactions. A common sense analysis should suffice for smaller projects, but a factual basis must still be demonstrated in each case if the imposition of conditions and requirements is challenged. The burden of fairness is “rough” proportionality, so it is not necessary to split hairs.

In two 1999 Utah Supreme Court cases, the Home Builders of Utah challenged the formalities associated with the imposition of impact fees. In the first, the Court held that municipalities must first disclose the basis upon which impact fees are imposed to anyone who challenges the reasonableness of the fees. The person opposing the fees must then show a failure to comply with the constitutional standard of reasonableness. This is logical when it is understood that impact fees are imposed by ordinance, and therefore the courts will uphold them so long as it is found to be reasonably debatable that they advance some public interest. *Home Builders v. City of North Logan*, 1999 UT 63, 983 P.2d 561 (Utah 1999).

In the second, the Court also held that the factors required by case law and statute to make an impact fee legal need not be specifically analyzed by each city council member or commissioner before the fee is imposed. The legislative body may rely on the expertise of others in setting fees. If in a later appeal it is determined that the fees meet the legal guidelines, then the fees will be upheld. Whether the fees are reasonable is not a matter of precise mathematical exactness. Such precise equality is neither feasible nor constitutionally vital. *Home Builders v. City of American Fork*, 1999 UT 7, 973 P.2d 425 (Utah 1999).

In an earlier case, *Banberry v. South Jordan*, 631 P.2d 899 (Utah 1981), the Court held that the presumption of constitutionality applies to a municipality’s establishment of impact fees. In order to avoid the impact fee, that presumption must be attacked by competent, credible evidence that the fees are unreasonable.

Under state statute, a local government entity must also follow precise procedures to enact an impact fee ordinance. See U.C.A. 11-36-101 to -402. If those specific statutory requirements are not followed, then a fee can be attacked on that basis alone.

Appealing Exaction Issues

Even if it appears that conditions and exactions on development may be inappropriate and excessive, there is a minefield of procedures to negotiate before a property owner can correct the situation. It is essential that several specific formalities be respected. If they are not, a property owner’s ability to challenge illegal exactions may be waived.

1) Protest “on the record.” Make sure the record created when the planning commission, city council, or other land use authority considers the approval and imposes the exactions includes a statement by the property owner that the conditions and exactions imposed are illegal and disproportionate. State clearly that you believe the conditions violate the state statute and the state and federal constitutions by taking your private property without the payment of just compensation. An appeal of this type of administrative decision is a record appeal, and the local

appeals authority or the judge or arbitrator will only be able to review the facts and evidence that you made sure were in the record of the decision. Be sure you include this specific allegation in the record during the original approval process and again in the record of the local appeal process. Do it in writing. Read it into the record and also hand a copy to the clerk who is keeping the minutes of the meeting.

2) Exhaust local appeals. File an appeal under the local ordinance in a timely manner. Do not miss the deadline, which can be as short as ten days after a final decision is rendered by the planning commission or city council. U.C.A. §10-9a-704 (municipalities) and §17-27a-704 (counties). Explain to the appeals authority your claim that the conditions and exactions are illegal and disproportionate to the board of adjustment or some other appeals body. The city or county bears the burden, and if the record does not show that it met the burden, then you should prevail. If the appeals authority does not agree that the conditions and exactions are inappropriate and illegal, then you may file an action in the district court or ask the property rights ombudsman to arrange arbitration. You may probably not appeal to the ombudsman formally or file a lawsuit before the local appeals process is given a chance to resolve your complaint. If you go right to court, you will most likely have your case dismissed after it is too late to file the local appeal because you missed the deadline. Do not overlook this step.

3) Arbitrate or litigate within 30 days. File a complaint or petition for review with the district court or a request for arbitration with the property rights ombudsman within 30 days of the date that the appeals body renders a final, written decision or takes another action that is considered final in the local ordinance. U.C.A. §§10-9a-708, 801, and 802 (municipalities) and §§17-27a-708, 801, and 802 (counties). If a request for arbitration is filed with the property rights ombudsman, he can stay the time during which a legal challenge can be filed, but only for the “takings” issues that involve private property rights. U.C.A. §10-9a-801(2)(b) (municipalities) and §17-27a-801(2)(b) (counties). He cannot preserve the right to make a challenge in court for a violation of local ordinance or state statute. See your attorney and/or call the ombudsman for more specifics in a given case.

The Office of the Property Rights Ombudsman

Utah has a unique and creative solution to disputes involving land use and property rights issues, including questions about development conditions and exactions.

The office of the property rights ombudsman was created in 1997 to assist property owners and government officials in understanding the law related to government regulation of property and related issues. In 2004 the Utah legislature included all land use issues within the ability of the ombudsman to resolve disputes. In 2006 authority to prepare advisory opinions on many land use issues was added to the ombudsman’s office.

An ombudsman is a person who, while an employee of the government, works to advise and assist citizens in resolving complaints and disputes with the government. His job is to listen to complaints, investigate them, and work to resolve issues in a manner that is satisfactory to the constituents of his employer. If he is effective, his efforts can also prompt systemic change and improvement in the procedures and policies of the governmental agency that employs him.

Utah's office of the property rights ombudsman, while hired by the state, can resolve disputes involving land use and property rights statewide. He works with state agencies and all local entities including cities, towns, counties, utility districts and school boards. He is an attorney whose full-time job is to understand and protect property rights.

While the ombudsman is to advocate for property owners, he cannot pretend that the law is different than the courts and the legislature have declared it to be. Sometimes property owners would prefer that the law was more favorable than it is. Many issues we call "property rights" do not really involve legal issues, but more political questions. The office of the ombudsman can help sort out what rights property owners can defend in a court room and what "rights" will have to be protected in the political arena.

Options for Resolving Disputes

While attorneys in the office do not go to court and argue for property owners, the office of the ombudsman has a number of tools to assist with resolving disputes. Under state statute, at Utah Code Annotated §, the office has the authority, at the request of the property owner, to convene mediation and arbitration sessions and otherwise bring people to the table to work for settlement of land use related disagreements.

You do not need to wait until the local approval process is complete before you call the ombudsman's office. They can advise those who call, whether government officials or property owners, about the law and act as a coach to assist those involved in the permitting process.

The office can work to conciliate when communications break down. Sometimes a property owner does not understand the jargon involved in land use issues and needs someone to interpret the planner's comments and help put the issues into context. He can call the officials involved and then relay to property owners what the issues are perceived to be and what the options are to proceed to resolution when a dispute comes up. Sometimes over a few phone calls the issues can be narrowed and a fair result promoted.

Sometimes in conciliation the office can encourage local officials to use care in following the law as the courts have laid it out. Sometimes it can bring the property owner back to earth and explain that the government officials are acting within their authority and not doing anything illegal.

If appropriate, an ombudsman can bring those involved in a dispute into a real time meeting through mediation. In a mediation the mediator does not impose a result or dictate who is right and who is wrong. Her job is to help the parties come to a resolution that is better than going to court or walking away. The parties are in charge of the outcome in mediation, and the mediator simply facilitates a result and offers ideas to accommodate the interests of the parties.

Occasionally an ombudsman can set up arbitration and appoint a third party neutral to hear a matter and make a decision on the merits. This is often done at no charge to either party, as volunteers who are knowledgeable and fair offer to take the time in the interest of public service.

to go over the facts and make a decision on the merits. While the ombudsman's office can impose this process on the local government or state agency involved at the request of the property owner, the resulting decision is not binding if either party wishes to appeal it to the district court. Once the matter goes to court, it is heard "de novo" and trial by jury is still available.

Attorneys are welcome to be involved in all the processes and discussions that the ombudsman uses to solve problems. With the advice of a skilled attorney, property owners and government officials can be even more likely to trust the result of mediation or arbitration through an ombudsman and avoid the hassle, cost and delays associated with litigation.

When dealing with development exactions and conditions, an ombudsman can be particularly helpful. The law as outlined in this pamphlet is relatively clear. The office of the property rights ombudsman can provide a quick reality check for either side of a discussion involving development approvals and move much quicker than a court to bring the parties into a forum where disputes can be resolved on the merits.

If appropriate, an ombudsman can also issue opinions, and state for the record her opinion as to the legality of a land use requirement. A formal advisory opinion can be requested under the 2006 revisions to state statute. If an opinion is issued and the matter later goes to court, the prevailing party's legal fees can be assessed against the losing party. This would be the case only if the court agreed with the advisory opinion. See other materials provided by the office on the internet or in printed form about advisory opinions.

Sometimes a letter from the ombudsman can assist all involved to follow the rules more precisely and come up with conditions on development that will withstand scrutiny if the matter were to be litigated or sent to arbitration.

The services of the office of the ombudsman are usually free. The office deals with all state and local government entities throughout the State of Utah. It can also assist with issues arising out of the use of eminent domain and with relocation matters when property owners are displaced by public projects.

Please feel free to call the ombudsman's office with questions about development conditions and approvals. Copies of forms and summaries of related legal issues are available on his website, noted below.

**How To CONTACT
THE OFFICE OF THE
PROPERTY RIGHTS OMBUDSMAN**

By MAIL: OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN
UTAH DEPARTMENT OF COMMERCE
160 EAST 300 SOUTH, SECOND FLOOR
P.O. BOX 146702
SALT LAKE CITY, UT 84114-6702

By PHONE: SALT LAKE: 801-530-6391
1-877-882-4662 - TOLL FREE
(1-877-UTAH OMB)

By FAX: 801-530-6338

By E-MAIL: PROPERTYRIGHTS@UTAH.GOV

By INTERNET: PROPERTYRIGHTS.UTAH.GOV